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Comment on Cases

ADMIRALTY: JURISDICTION: "CONSTRUCTION" OR "REPAIR"?—It has, of course, long been settled that admiralty has no jurisdiction over a contract to construct a vessel,¹ and that construction includes work done upon a vessel as part of the original design even after her launching, either by the original builder of the hull² or by some other person employed to install machinery.³ It has been equally clear that admiralty has jurisdiction over a contract of repair,⁴ and that within the term "repair" are contracts involving alterations by no means slight, such as those for changing the type of machinery,⁵ for lengthening the hull,⁶ and for the like. The line drawn between construction and repair has often followed a somewhat illogical and arbitrary course and the necessity of drawing it has seemed unfortunate⁷, but on the whole the law was fairly clear.

In *The Geo. L. Harvey*, however, decided by District Judge Neterer in the District Court for the Western District of Washington, the line has been drawn in a way inconsistent with previous decisions, and a contract certainly not of construction in the generally accepted sense has been held not to give rise to a maritime lien.⁸ A submarine chaser—that is, a war-vessel, apparently fully completed and probably already used—was sold to the claimant. The libellant was employed to fit the vessel for use in fishing. The work done was the removal of forward cabins, one engine and two bulkheads, the cutting of two hatches, and the building of a rail. This was held to be construction. Judge Neterer relied principally upon the case of *Thames Towboat Company v. Schooner "Francis McDonald,"*⁹ clearly distinguishable because there the vessel had not been previously completed for any use. A second ground for the decision was that the vessel was for a purpose "foreign to commerce and trade. It did not receive upon launching a commercial or trade status. It was not subject to admiralty jurisdiction, and before she [*sic*] would be subject to admiralty she must be divested of the attributes of war and clothed with the conveniences and necessities of commerce and trade."

The case cited in support of this doctrine is also clearly dis-

¹ *Peoples Ferry Co. v. Beers* (1858) 61 U. S. (20 How.) 393, 15 L. Ed. 961; *The Winnebago* (1907) 205 U. S. 354, 51 L. Ed. 836, 27 Sup. Ct. Rep. 509.

² *The Winnebago*, *supra*, n. 1.

³ *Thames Towboat Co. v. The Schooner Francis McDonald* (1920) 254 U. S. 242, 65 L. Ed. 83, 41 Sup. Ct. Rep. 65; *The Tosco* (Dist., E. D. Mich., 1874) Brown Adm. 495. Fed. Cas. No. 7060; *The William Windom* (Dist., N. D. Iowa, E. D., 1896) 73 Fed. 496.

⁴ *North Pacific S. S. Co. v. Hale Bros. Mar. R. & S. Co.* (1919) 249 U. S. 119, 63 L. Ed. 510, 39 Sup. Ct. Rep. 221.

⁵ *The L. B. X.* (Dist. Ct., W. D. Mo. C. D., 1899) 93 Fed. 233; *The Manhattan* (Dist. Ct. Wash. N. D., 1891) 46 Fed. 797.

⁶ *The Susquehanna* (Cir. Ct. App., 2nd Circ., 1920) 266 Fed. 811.

⁷ Benedict, *Admiralty*, 4th ed., § 184 II.

⁸ (Mar. 25, 1921) 273 Fed. 972.

⁹ *Supra*, n. 3.

tinguishable.¹⁰ The vessel there involved was a yacht, and the libellant's contract was to install propelling machinery as part of her original design. The case turned wholly upon this latter fact, and not upon her status as a yacht. The language above quoted would exclude from admiralty jurisdiction any vessel not for commercial or trade purposes. This is opposed to many decisions.¹¹ While it is possible that the submarine chaser would, in a qualified sense, have not been subject to admiralty jurisdiction while still a war vessel, nevertheless the better opinion is that her torts and contracts give rise to a lien, but a lien unenforceable because of her possession and use for governmental purposes.¹² The comparatively minor changes made to fit her out as a fishing vessel should, therefore, in any event, have no more effect than similar minor changes in transforming an admittedly commercial cargo carrier into a fishing vessel.

A. T. W.

ALIENS: DEVISE TO NON-RESIDENT ALIEN: EFFECT OF TREATY WITH ITALY: REAL PROPERTY RIGHTS OF ALIENS UNDER CALIFORNIA LAW—In *Estate of Turner*¹ the Attorney General petitioned for a rehearing by the District Court of Appeal² and later for a hearing by the Supreme Court upon the question whether a "most-favored-nation" clause in a treaty eventuating in giving aliens real property rights suspends and controls state law upon the subject.³ The testatrix had devised part of her real estate in California to Basletta, a non-resident Italian. The Superior Court distributed the property according to the will upon the theory that invoking

¹⁰ The Paradox (Dist. Ct., E. D., N. Y., 1894) 61 Fed. 860.

¹¹ In *Reppert v. Robinson* (Cir. Ct., Md., 1851) Taney 492, 498, Fed. Cas. No. 11, 703, Chief Justice Taney said with regard to a libel *in personam* for repairs: "The manner in which the vessel is actually employed cannot affect the question of jurisdiction. It depends upon her character; if the repairs fitted her for navigation of the sea, the contract was maritime; and it did not rest with the owner to confer or take away the admiralty jurisdiction, at his pleasure, by the mode or trade in which he afterwards employed her." The vessel, a schooner, was used to carry the owner's own goods to market. Yacht: jurisdiction taken *in rem* in suit for care and repair and salvage, *The Navis* (Dist. Ct., Maine, 1912) 196 Fed. 843; houseboat: towage, *A scow* without a name (Dist. Ct., E. D. N. Y., 1897) 80 Fed. 736; pumpboat: repairs, *Charles Barnes Co. v. One Dredge Boat* (Dist. Ct., E. D. Ky., 1909) 169 Fed. 895.

¹² *The Gloria* (Dist. Ct., S. D. N. Y., 1920) 267 Fed. 929 (vessel, "a part of the United States Navy navigated and manned by officers and a crew of the Navy and used solely in the transportation of troops of the United States Army . . ."); *The Mavisbrook* (Dist. Ct., Md., 1921) 270 Fed. 1011 (requisitioned vessel); *The F. J. Luckenbach* (Dist. Ct., S. D. N. Y., 1920) 267 Fed. 931 (requisitioned vessel). Cf. *The Ceylon Maru* (Dist. Ct., Md., 1920) 266 Fed. 396; *The City of Philadelphia* (Dist. Ct., E. D., Pa., 1920) 263 Fed. 234; *The Florence H.* (Dist. Ct., S. D. N. Y., 1918) 248 Fed. 1012; 7 California Law Review, 251.

¹ (Feb. 8, 1921) 34 Cal. App. Dec. 463, 169 Pac. 807.

² Denied (Mar. 10, 1921) 34 Cal. App. Dec. 759.

³ Petition for hearing by the Supreme Court denied April 8, 1921.